MONOHAR SUPPIAH

v.

LIEW SOOI SANG

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. P 377/80]
15 JUNE 1983

TORT: *Damages - Quantum - General damages and loss of earnings - Loss of future earnings not pleaded.*

Both the parties admitted equal liability for the accident in which they were involved and also agreed to special damages of RM750. The only disputed issues were a quantum of general damages and loss of earnings.

Held:
Plaintiff's Claim (based on 50% liability)

(i)	Pain and suffering and loss of amenities	RM 9,000
(ii)	Loss of earnings capacity	RM12,000
(iii)	Loss of earnings	RM 3,430

(Loss of future earnings was disallowed as it was not specifically pleaded. *Lim Eng Kay v. Jaafar* [1982] CLJ (Rep) 190 was distinguished).

Interest on item (i) at 6% per annum from date of service of writ to date.

Interest on item (iii) and special damages at 3% per annum from date of accident to date.

Per Curiam:

> It is important to realise that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity Compensation for future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages - Lord Denning in *Fairley v. John Thompson* (*Design and Contracting Division) Ltd.* [1973] 2 Lloyds Rpt. 40.

[Judgment for the plaintiff.]

Cases referred to:
Ilkiv v. Samuels & Ors. [1963]1 WLR 991
Lim Eng Kay v. Jaafar [1982] 2 MLJ 156; [1982] CLJ (Rep) 190
Fairley v. John Thompson (Design and Contracting Division) Ltd. [1973] 2 Lloyds Rep 40
Moeliker v. A. Reyrolle & Co. Ltd. [1977] 1 All ER 9
Lim Kong Yeng v. Yap Wee Ying [1982] CLJ (Rep) 529

Other sources reperred to:
Dass Quantom in Accident claims, vol. 2, pp. 205, 208

For the plaintiff - Guy Vareghese
For the defendant - W. Abraham

JUDGMENT

Siti Norma Yaakob J:

Both the parties to this action admit that they are equally liable for the accident that occurred on 14 September 1978 and they also agree to special damages amounting to RM750. The only disputed issues before me were on quantum of general damages and loss of earnings.

As a result of the accident, the plaintiff suffered

(1) a compound fracture of the left tibia and fibula which was treated initially in a plaster cast but when this showed non-union, the plaintiff underwent an operation on 15 December 1978 when bone grafting and plating was done. The plate was subsequently removed in February 1980 after the bones had united. However, it left two surgical scars measuring 17cm. and although there was no shortening, the girth of his left thigh was reduced by 4 cm. and the left leg was wasted by 1 cm.

(2) injury to the ligaments of the left knee for which the initial treatment had little effect and an operation was done on 15 May 1981 which proved to be partially successful as there is still a laxity of the posterior cruciate ligament which continues to give him pain and which cannot be adequately treated by any surgical operation and will remain a permanent disability. He is also unable to run well or climb steps rapidly and he finds difficulty in squatting. There is also medical evidence to show that early osteoarthritis will set in.

For these two injuries I was referred to three unreported cases:

(1) *Rajendran s/o Soorangam, an infant, suing by his father, his next friend Soorangam s/o Sivasamy and Anor. v. Lau Boon Pin* Dass Quantum in Accident Claims Vol. 2 p. 205

(2) *J. Kumaran s/o Balakrishnan v. Tan Po Tin* Dass Quantum in Accident Claims Vol. 2 p. 205

(3) *Mohamad bin Samsudin v. Mohni bin Sambioh and Anor.* Dass Quantum in Accident Claims Vol. 2 p. 208

In the first case RM12,000 was awarded on a 100% liability for a fracture of the right tibia and fibula and a fracture of the right medial malleolus with a ½" shortening. I could not get much assistance from this judgment as the case was then under appeal and I have no means of knowing whether the award was confirmed or varied. In the second case, RM15,000 was awarded in 1979 for a fracture subluxation of right knee joint, fracture of lateral half of upper tibia condyle, fracture of upper 1/3 right fibula and fracture of lower 1/3 right tibia. The plaintiff complained of weakness and instability of right knee joint and the right leg is smaller than the left. He also found difficulty in squatting and climbing steps. Although the fracture of the right fibula and right tibia healed well, the stiffness and pain in the right knee were permanent and osteoarthritis would develop and which would be progressive as the plaintiff advances in age. In the third case, decided also in 1979, RM16,000 was awarded for a comminuted fracture of upper 1/3 of right fibula and right tibia at its middle. There was also 1" shortening, the plaintiff is unable to place his left foot flatly on the ground and had difficulty in squatting.

Of these three cases, the injuries suffered by plaintiff before me are almost identical to that suffered by the plaintiff Kumaran in the second case above. With regard to pain and suffering, I also reminded myself that the plaintiff underwent three operations on 15 December 1978, in February 1980 and on 15 May 1981 and had been under constant medical attention for 3 years. Bearing in mind that his case is decided 4 years after *Kumaran's* case, and taking into consideration the extent of his injuries, I consider a sum of RM18,000 for pain and suffering reasonable and fair under the circumstances based on a 100% liability. As liability has been agreed at 50:50, judgment will be entered for the plaintiff for the sum of RM9,000 for pain and suffering and loss of amenities.

I now come to the plaintiff's claim for loss of earnings, both for the pre-trial period and post-trial period. At the time of the accident, he was a Hospital Assistant, employed by the Chinese Maternity Hospital, earning a basic salary of RM535 per month plus a variable overtime allowance. Based on the figures given at p. 16 of the AB 1, his average monthly salary for four months from July to October 1978 came to RM636.78. However, there was undisputed evidence that before the accident he had been applying for better paid jobs to various agencies and one of his applications was successful as he received an offer of an appointment as an Industrial Health Technician by Esso in a letter dated 22 November 1978 (p. 19 of AB 1) with a basic salary of RM620 plus another RM365 as offshore allowance, making total of RM980 per month. However, the offer was subject to his passing a medical examination for which at that time he was in no way fit as his leg was then in a plaster cast. Although he had signed the letter accepting the offer, he could not give Esso a firm commitment when he could take up the employment and when the deadline of the validity of the offer expired, Esso withdrew the offer in a letter dated 7 March 1979 (p. 21 AB 1). Under these circumstances, Counsel for the defendant maintained that the pre-trial loss of earnings should be calculated on the salary he received as a Hospital Assistant working for the Chinese Maternity Hospital and not what he would have received had he taken up Esso's offer as the offer was still subject to him being certified medically fit. That is so but it must also be remembered that the defendant is partly to blame for him being medically unfit. Apart from the injury resulting from the accident, there was no other evidence to show that the plaintiff was in any other way medically unfit to accept the offer and on that finding, pre-trial loss of earnings will therefore be calculated on the earnings that he would have received from Esso had he not been prevented from his injuries from taking up the appointment.

When could he have started working for Esso? This would only be after he had given notice to terminate his services with the Chinese Maternity Hospital. No evidence was led as to the terms and conditions of his service with them particularly regarding the period of notice to be given by him. However, there is evidence at p. 17 of AB 1 that as employers, the Chinese Maternity Hospital need only give him one month's notice of termination of service which they did on 23 November 1978. By analogy and in the absence of evidence to the contrary, I hold that a month's notice is equally a reasonable period within which he needed to inform his employers of his desire to leave their employment. Discounting the last few days of November 1978, if the plaintiff had given his notice of termination of service to the Chinese Maternity Hospital on 1 December 1978, he would be in a position to start work with Esso on 1 January 1979. Of course there is a possibility that he could give them 24 hours notice but this would mean that he had also to pay back one month's pay in lieu which I reckon the plaintiff can ill-afford then.

From the evidence, it is clear that he suffered no loss of earnings from the date of accident until 23 November 1978 as the Chinese Maternity Hospital continued paying him his wages (see p. 16 of the AB 1). However, for one month from 23 November 1978 until 23 December 1978, his employers did not pay him and this may be due to the fact that he had utilised all his leave entitlement for which he would have been paid even if he had not worked. Moreover, he never reported for duty after the accident and it may well be that for this very reason his employers terminated his service. Under these circumstances, I calculate his pre-trial loss of earnings from 1 January 1979 on the salary he would have received had he been able to work for Esso at RM980 per month.

Having decided so, I next ask myself how long would he be entitled to claim for such damages. Loss of earnings, past and future, is an item of special damage which the plaintiff is entitled to claim provided that it is specifically pleaded (Kemp & Kemp. Quantum of Damages Vol. 1 p. 124, *Ilkiv v. Samuels and Ors.* [1963] 1 WLR 991, *Sam Wun Hoong v. Kader Ibramshah s/o Pichay* FCCA No. 16/80 (unreported)). At pp. 3 and 4 of the Statement of Claim under the heading "Particulars of Special Damages", the plaintiff has itemised and quantified the various special damages, the last being "Loss of salary at RM980 per month from 23 November 1978 to 31 July 1979 (say 9 months ... RM8,8220". He then pleaded further as follows:

> As a result of the accident, the plaintiff has suffered loss of earning capacity for which he claims.
>
> And the plaintiff claims damages, interest and costs.

Apart from specifying his loss of earnings limited to 9 months, the plaintiff has clearly not pleaded loss of earnings after that the period or future loss earnings after trial but instead pleaded loss of earning capacity.

Counsel for the plaintiff tried to remedy this oversight on his part by relying on the Federal Court case of *Lim Eng Kay v. Jaafar* [1982] CLJ (Rep) 190 where on a similar objection raised, the Court held that "a purely technical error on the part of the solicitors who were not up-to-date" with legal technicality should not be taken against their clients. However, I need to distinguish the pleadings before the Federal Court from the pleadings of this case before me. The respondent/plaintiff in the Federal Court, had amended his pleadings to include loss of earnings, both past and prospective. Coupled with this, he had also pleaded a prayer "any other relief which this Honorable Court deem fit to grant". The Federal Court held that this prayers is not "to be treated as a mere Ornament to pleadings devoid of any meaning" and together with the prayer for loss of earnings entitled the Court to make an assessment on future loss of earnings. Clearly there is no such prayer in the plaintiff's statement of claim before me and since loss of earnings (other than that claimed for 9 months) has not being specifically pleaded, l am only able to award him, loss of past earnings limited to 9 months if proved, and to disallow the claim for loss of future earnings altogether.

Now what evidence have been adduced on this aspect. The plaintiff testified that after his services were terminated by the Chinese Maternity Hospital in December 1978, he found himself jobless. Subsequently he managed to secure a temporary employment with the Malaysian Red Crescent Society at Kuala Bedong with a salary of RM600 per month. His duties were similar to that of an Hospital Assistant but he only managed to work for 3 months as his left leg continued to give him pain. There were some dispute in evidence as to when he actually started working for the Red Crescent Society. In his oral testimony he mentioned that it was in August 1981 whereas a medical certificate appearing at p. 6 of AB 1 dated

3 November 1979 issued to him by the University Hospital described him as being employed by the Red Crescent Society in July 1979. However, what was not disputed was that he worked for 3 months at a salary of RM600 per month. Prefering the date given in the medical certificate I hold that he started work for the Red Crescent Society with effect from July 1979 and this would mean that from 1 January 1979 he was incapacitated for a period of 7 months. For this 7 months period, he is entitled to 980 x 7 = RM6,860 by way of loss of earnings.

Lastly, I come to the plaintiff's claim for loss of earning capacity. There is a difference between loss of future earnings and loss of earning capacity as pointed out by Lord Denning MR in the case of *Fairley v. John Thompson (Design and Contracting Division) Ltd.* [1973] 2 Lloyds Rpt. 40 as follows

> It is important to realise that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages.

To ascertain whether the plaintiff is entitled to loss of earning capacity, I am guided by the case of *Moeliker v. A. Reyrolle & Co. Ltd.* [1977] 1 All ER 9 where the Court of Appeal laid down principles on which damages for loss of earning capacity should be assessed.

> This head of damage generally arises when the plaintiff is at the time of trial in employment but there is a risk that he may lose his employment some time in the near future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job ... The consideration of this head of damage should be made into two stages
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> (1) Is there a "substantial" or "real" risk that a plaintiff will lose his present job at some time before the estimated end of his working life?
>
> (2) If there is (but not otherwise), the Court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materalises, having regard to the degree of the risk, the time when it may materialise and the factors both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job.

The Court also held that no mathematical calculation is possible in assessing and quantifying the risk in damages and that each case depends on its own facts, a low award being preferred where the risk is only slight.

In *Moeliker's* case, the Court of Appeal upheld the award made to the plaintiff under this head which represented 6 months of his pay. Nearer to home, V. C. George J in *Lim Kong Yeng* (*an infant), suing by his father and next friend, Lim Kwee Fong v. Yap Wee Ying* [1982] CLJ (Rep) 529, awarded RM4,000 under this particular head of claim which represented 10% loss of the earning power of the plaintiff who was a manual worker. Azmi FJ in *Sam Wung Soong's* case above, affirmed an award of RM12,000 for loss of earning capacity but unfortunately apart from agreeing that the award was reasonable, no other facts were disclosed both in the Federal and High Courts how this amount was arrived at.

The plaintiff before me is 46 and is self-employed. He drives his own taxi but because of the leg injury, is only able to do so part-time for a period 3 to 4 hours a day. There is a medical evidence that no other cure is possible to his leg and osteoarthritis will set in. Bearing this in mind and the principles laid down in *Moeliker's* case above, there is a strong possibility that in the near future he may have to abandon his livelihood as a taxi-driver and seek some other job where his leg will not be so taxed. Counsel for the defendant sought to rely on the

medical report at p. 4 and AB 1 wherein the plaintiff has been certified as being competent to drive car. I do not give much reliance to this report as it was issued on 20 August 1980 and it is superceded by the later medical report dated 18 March 1982 appearing at p. 1 of the SAB 2 which sets out in detail his present disabilities and which convince me that driving a motor car may in time to come be of great difficulty to him due to the progressive deterioration of the condition of his leg. From these circumstances, it is clear that the plaintiff runs the risk of being thrown into the open market and he may be at a disadvantage as he had, before being a taxi-driver, worked as an Hospital Assistant all along and he may well have to learn a new trade altogether. Bearing this in mind, I consider 5 years loss of earnings calculated on his present earnings as reasonable loss of earning capacity and accordingly award him RM400 x 60 = RM24,000 by way of loss of his earning capacity. On an equal liability apportionment, this will be reduced to RM12,000.

On the whole then, there will be judgment to the plaintiff for the sum of RM21,000 (RM9,000 + RM12,000) general damages, with interest on RM9,000 at the rate of 6% per annum from the date of service of the writ until today, agreed special damages at RM750, loss of earnings at RM3,430 interest on RM4,180 (RM750 + RM3,430) at the rate of 3% per annum from date of accident to date hereof, and costs.

Also found at [1983] 2 CLJ 140